IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 14TH NOVEMBER 2007 / 23RD KARTHIKA 1929

RSA.No. 677 of 2007()

AS.37/2006 of SUB COURT,NEYYATTINKARA
OS.398/2004 of PRL.M.C.,NEYYATTINKARA
.....

: APPELLANT/APPELLANT/PLAINTIFF

SANKARA PILLAI VIKRAMAN NAIR,
RESIDING AT ARUN NIVAS,
ARYANCODE, MYLACHAL DESOM,
KEEZHAROOR VILLAGE, NEYYATTINKARA.

BY ADV. SRI.L.MOHANAN
SMT.LIGEY ANTONY

RESPONDENTS: RESPONDENTS/DEFENDANTS
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1. RAJAMMA, W/O.APPUKUTTAN, RESIDING AT
ASHA BHAVAN, MUTTAKKADU DESOM,
PERUMPAZHUTHOOR VILLAGE, NEYYATTINKARA.

2. ARUN, S/O.APPUKUTTAN, RESIDING AT
-DO- -DO-

3. ASHA, D/O.RAJAMMA, RESIDING AT -DO- -DO-

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 14/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

R.S.A.No.677 OF 2007

Dated this the 14th day of November, 2007

JUDGMENT

Plaintiff in O.S.No.398/04 on the file of Additional Munisiff, Neyyattinkara is the appellant. Defendants are the respondents. Case of the appellant was that deceased Appukuttan, husband of the first respondent and father of respondents 2 and 3 borrowed Rs. 45,000/- from the appellant on 01/01/2002 and later when appellant demanded repayment of the amount, he issued Exts. A1 and A2 cheques dated 30/1/03 respectively for Rs. 10,000/- and Rs. 35,000/- in his account maintained in State Bank of Travancore, Vikas Bhavan branch and when the cheque was presented for encashment, they were dishonoured under Ext.A3 and A4 and Appukuttan died on 21/07/2002 and his assets were inherited by respondents and appellant sent Ext.A6 notice demanding the amount and though second respondent accepted the notice, other respondents did not receive the notice. Appellant had originally issued Ext.B1 notice where the date of transaction was mistakenly stated as 01/12/2002 instead of 01/01/2002 and because of the said mistake, ExtA6 notice was issued and

appellant is entitled to realise the amount from the assets left by deceased Appukuttan in the hands of respondents. Respondents resist the suit contending that Appukuttan had no transaction with the appellant and he did not borrow any amount and did not issue the cheque towards repayment of the amount and hence Appukuttan is not entitled to the decree sought for.

Learned Munisiff on the evidence of PWs 1 and 2, DW 1 and 2, Exts.A1 to A13 , B 1 to B6 and X1 to X3 dismissed the suit holding that the appellant did not succeed in establishing the transaction. Appellant challenged the decree and judgment before Sub Court, Neyyattinkara in A.S.NO.37/2006. Learned Sub Judge on re-appreciation of evidence confirmed the findings of learned Munisiff and dismissed the appeal. It is challenged in the second appeal.

Learned counsel appearing for appellant was heard. The argument of the learned counsel is that the defendants case was that Appukkuttan had no transaction with appellant and Exts.A1 and A2 cheques were issued from an account which was closed in 1987 and the transaction was proved by the evidence of PW1 supported by PW2, who was present at the time of the transaction and in such circumstances, courts below should have granted the decree.

On hearing the learned counsel, I do not find any substantial question of law in the appeal. The suit is for realisation of the amount due under an oral transaction. Ext.B1 was the first notice issued by the appellant, through a counsel, to the respondents after the death of Appukuttan demanding the amount. What was alleged in Ext.B1 notice was that Appukuttan borrowed the amount on 01/12/2002. It is admitted in the plaint itself that Appukuttan died on 21/07/2002. Therefore he could not have borrowed the amount on 01/12/2002. When under Ext.B2 respondents denied the transaction and contended that Appukuttan did not borrow any amount, appellant realised the mistake in the date of the oral loan and Ext.A6 notice was sent stating that amount was borrowed not on 01/12/2002 but on 01/01/2002. Even though respondents under Ext.B2 denied the transaction, even when Ext.A6 notice was sent or the suit was filed, appellant did not disclose who were present at the time of the alleged transaction. Name of PW2 was disclosed for the first time, when PW1 was examined. If in fact PW2 was present at the time of the transaction, appellant could have mentioned atleast in the plaint . When this aspect is appreciated in the light of the fact that the originally the case of appellant was that the amount was borrowed on 01.12.2002 and the Appukuttan died ion

21/07/2002, the omission to mention the presence of PW2 is fatal. Added to this what was pleaded in the plaint as well as in Ext.B1 and A6 notices was that Exts.A1 and A2 cheques were issued when the amount was demanded from Appukuttan. But when PW1 was examined the case was that Appukuttan approached appellant along with Exts.A1 and A2 cheques and those cheques were issued as post dated cheque at the time of borrowal. If that be the case, it would not have stated in Ext.B1 notice and Ext.A6 notice and it would not have pleaded in the plaint that Exts.A1 and A2 cheques were issued when the amount was demanded and the case would have been that when Rs. 45, 000/- was borrowed , towards the repayment at the time of the transaction Exts.A1 and A2 post dated cheque was issued. In the light of these inherent defects, appreciation of evidence by courts below cannot be said to be perverse warranting re-appreciation. The concurrent finding of fact by the Courts below cannot be interfered in the light of the evidence on record.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

sv.